TM Feroze Khan & Ors v Meera Hussain bin TM Mohamed Mydin

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–16 OF 1997(A)

CHONG SIEW FAI CJ (SABAH AND SARAWAK), EDGAR JOSEPH JR AND MOHAMED DZAIDDIN FCJJ

26 MAY 1999

Civil Procedure *— Want of prosecution — Striking out action for want of prosecution — Two related actions — Whether reasonable for plaintiffs to await outcome of application to intervene — Test applied — Whether inordinate and inexcusable delay*

The four plaintiffs were the children of the deceased from his first marriage, while the first defendant was the child of the deceased from his second marriage. The deceased owned a piece of land described as Lot 465, Sek 11-W Daerah Timur Laut, Georgetown, Penang on which nine houses were erected ('the property'). On or about 2 February 1968, the deceased transferred the property to himself as trustee for the benefit of the first defendant. On 12 October 1991, the deceased passed away. Sometime in 1992, the first defendant took out an originating summons and obtained an ex-parte order dated 5 October 1992 vesting the property in his name. Later, the plaintiffs filed a statement of claim claiming, inter alia, that the purported gift of the property is null and void. The plaintiffs also applied to intervene and set aside the vesting order in the first defendant's originating summons. The pleading in the plaintiffs claim were deemed to be closed on 22 June 1995. As the plaintiffs had failed to file a summons for direction, the first defendant applied to strike out the plaintiff's writ action for want of prosecution. The learned trial judge dismissed the plaintiff's action which was affirmed by the Court of Appeal (see [1997] 3 MLJ 800) and hence this appeal. The court considered the alleged delay under two time-frames, ie from 22 June 1995 to 30 September 1995 ('the first alleged delay') and from 30 September 1995 to 30 March 1996 ('the second alleged delay'). The first alleged delay covers the time when the pleadings were deemed to be closed (22 June 1995) to the date (30 September 1995) when the learned trial judge directed the plaintiffs to apply for consolidation of the two actions, while the second alleged delay covers the time when there was direction to consolidate the two actions (30 September 1995) to the date of the first defendant's application to strike out this action (30 March 1996).

Held, allowing the appeal:

(1) Whether a delay of over three months (the first alleged delay from 22 June 1995 to 30 September 1995) is inordinate and inexcusable depends on the facts and circumstances of each particular case. There existed two actions in tandem (ie the originating summons by the first defendant and the writ action by

the plaintiffs), each with claims that are intricately related to those in the other. At the time the pleadings in the writ action were deemed to be closed, the plaintiffs had already filed the application seeking to intervene in the first defendant's originating summons, and the application was yet to be heard. The fact that the judge subsequently, in granting the plaintiffs leave to intervene in the originating summons, had also directed the plaintiffs to apply for consolidation of the two actions lends support to the reasonableness of the stand of the plaintiffs to await the outcome of their application to intervene and to set aside the vesting order. The alleged delay cannot be said to be inordinate and inexcusable (see pp 331I–332E); *Birkett v James* [1978] AC 297 followed.

(2) In respect of the second alleged delay, the affidavit of the plaintiffs dated 10 April 1996 detailed the difficulty in extracting the orders granting them leave to intervene and showed that from the time the intervention order was given, they had actively taken all the necessary steps to get the order sealed (see p 332F–G). Considering that there was a direction to the plaintiffs from the judge to consolidate the two actions, no blame can be attached to the plaintiffs in acting in the manner that they did, ie applying for consolidation rather than taking out a summons for directions. There is no inordinate and inexcusable delay. Since there had been no inordinate and inexcusable delay, the question of substantial risk for a fair trial or prejudice to the first defendant consequential upon the delay (principle 2(b) in *Birkett v James* [1978] AC 297) does not arise (see pp 332I–333A, H–I).

(3) The order for consolidation was made subsequent to the first defendant filing the application to strike out the plaintiffs' writ action. It is reasonable to assume that by ordering consolidation, the learned trial judge must have considered it proper for the plaintiffs' writ action to proceed and that there existed some common question of law or fact or some other reason rendering it desirable that the whole should be disposed of at the same time. As such, there was merit for the plaintiff to contend that it was wrong for the learned trial judge to strike out the plaintiffs' writ action for want of prosecution when barely 14 days earlier he had ordered the consolidation of the first defendant's originating summons with the plaintiffs' writ action (see p 334B–D).

[Bahasa Malaysia summary

Keempat-empat plaintif adalah anak kepada si mati manakala defendan pertama adalah anak kepada si mati daripada perkahwinannya yang kedua. Si mati memiliki sebidang tanah yang digambarkan sebagai Lot 465, Sek 11–W Daerah Timur Laut, Georgetown Penang di mana sembilan buah rumah didirikan ('hartanah tersebut'). Pada atau lebih kurang 2 Februari 1968, si mati telah memindahkan hartanah tersebut kepada dirinya sendiri sebagai

pemegang amanah untuk manfaat defendan pertama. Pada 12 Oktober 1991, si mati telah meninggal dunia. Lebih kurang pada tahun 1992, defendan pertama telah mengeluarkan saman pemula dan memperolehi suatu perintah ex parte bertarikh 5 Oktober 1992 dan meletakhak hartanah tersebut di atas namanya. Kemudian, plaintif-plaintif memfailkan pernyataan tuntutan menuntut, antara lain, bahawa pemberian hartanah yang dikatakan adalah batal dan tak sah. Plaintif-plaintif juga memohon untuk mencelah dan mengetepikan perintah letak hak di dalam saman pemula defendan pertama. Pliding di dalam tuntutan plaintif-plaintif dianggap ditutup pada 22 Jun 1995. Oleh kerana plaintif gagal untuk memfailkan saman untuk arahan, defendan pertama memohon untuk membatalkan tindakan writ plaintif kerana kelengahan untuk membuat pendakwaan. Hakim perbicaraan yang arif menolak tindakan plaintif yang disahkan oleh Mahkamah Rayuan (lihat [1997] 3 MLJ 800) dan sebab itu rayuan ini dibuat. Mahkamah telah mempertimbangkan kelengahan yang dikatakan dalam dua tempoh masa iaitu dari 22 Jun 1995 hingga 30 September 1995 ('kelewatan yang pertama') dan dari 30 September 1995 sehingga 30 Mac 1996 ('kelewatan yang kedua'). Pengataan kelewatan yang pertama meliputi masa di mana pliding dianggap sebagai telah ditutup (22 Jun 1995) sehingga tarikh (30 September 1995) apabila hakim perbicaraan mengarahkan plaintif-plaintif untuk menyatukan kedua-dua tindakan tersebut, sementara pengataan kelewatan yang kedua meliputi masa di mana terdapat arahan untuk menyatukan kedua-dua tindakan (30 September 1995) sehingga tarikh permohonan defendan pertama untuk membatalkan tindakan ini (30 Mac 1996).

Diputuskan, membenarkan rayuan:

(1) Sama ada kelewatan selama lebih dari tiga bulan (kelengahan yang pertama dari 22 Jun 1995 hingga 30 September 1995) adalah melampau dan tidak boleh dimaafkan adalah bergantung kepada fakta dan keadaan-keadaan setiap kes. Wujud dua tindakan yang berkaitan (iaitu saman pemula oleh defendan pertama dan tindakan writ oleh plaintif), masing-masing dengan tuntutan yang begitu berkaitan dengan yang lain. Pada masa pliding di dalam tindakan writ dianggap sebagai ditutup, plaintif telah pun memfailkan permohonan untuk mencelah di dalam saman pemula defendan pertama dan permohonan tersebut belum lagi didengar. Fakta bahawa hakim kemudiannya, di dalam memberikan plaintif-plaintif kebenaran untuk mencelah di dalam saman pemula, juga telah mengarahkan plaintif-plaintif untuk memohon untuk menyatukan kedua-dua tindakan menyokong kemunasabahan pendirian plaintif-plaintif untuk menunggu keputusan permohonan mereka untuk mencelah dan membatalkan perintah letakhak tersebut. Pengataan kelengahan tersebut tidak boleh dikatakan sebagai melampau dan tidak boleh dimaafkan (lihat ms 331I–332E); *Birkett v James* [1978] AC 297 diikut.

(2) Berkenaan dengan kelewatan yang kedua, afidavit plaintif-plaintif bertarikh 10 April 1996 menjelaskan secara terperinci kesukaran untuk mengambil perintah membenarkan mereka untuk mencelah dan menunjukkan dari masa perintah mencelah diberikan, mereka telah secara aktif mengambil langkah-langkah yang perlu agar perintah dimeteraikan (lihat ms 332F–G). Memandangkan bahawa terdapat arahan kepada plaintif-plaintif daripada hakim untuk menyatukan kedua-dua tindakan tersebut, plaintif-plaintif tidak boleh disalahkan apabila bertindak dengan cara yang dibuat mereka, iaitu memohon untuk penyatuan dan bukan mengeluarkan saman untuk arahan. Tiada kelewatan yang melampau dan tidak boleh dimaafkan. Oleh kerana tiada kelewatan yang tidak boleh dimaafkan dan melampau, persoalan risiko yang besar untuk perbicaraan yang adil atau prejudis kepada defendan pertama yang timbul akibat kelewatan tersebut (prinsip 2(b) dalam *Birkett v James* [1978] AC 297) tidak timbul (lihat ms 332I–333A, H–I).

(3) Perintah untuk penyatuan dibuat selepas defendan pertama memfailkan permohonan untuk membatalkan tindakan writ plaintif. Adalah munasabah untuk menganggap bahawa dengan mengarahkan penyatuan, hakim perbicaraan yang arif telah menganggap sebagai wajar untuk tindakan writ plaintif diteruskan dan bahawa wujud persoalan undang-undang dan fakta yang sama atau sebab-sebab lain yang menjadikan adalah sesuai bahawa keseluruhannya diputuskan pada masa yang sama. Oleh itu, terdapat merit untuk plaintif menegaskan bahawa adalah salah untuk hakim perbicaraan untuk membatalkan tindakan writ plaintif untuk kelengahan untuk membuat pendakwaan apabila hanya 14 hari lebih awal beliau telah mengarahkan penyatuan saman pemula defendan pertama dengan tindakan writ plaintif-plaintif (lihat ms 334B–D).]

Notes

For cases on want of prosecution, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4974–5015.

Cases referred to

Arab-Malaysia Finance Bhd v Malacca Development Corp Sdn Bhd & Ors [1997] 5 MLJ 685 (refd)

Balwant Singh Purba v R Rajasingam [1996] 4 MLJ 404 (refd)

Birkett v James [1978] AC 297 (folld)

Biss v Lambeth Health Authority [1978] 2 All ER 125 (refd)

Datuk Samy Vellu v Karpal Singh [1989] 3 MLJ 493 (refd)

KS Chua & Co v Chui Miang Chew [1995] 4 MLJ 436 (refd)

Lee Boon Tin v Trustees of Leong San Tong Khoo Kongsi [1996] 5 MLJ 601 (refd)

Negara Properties Sdn Bhd v Akitek Bersekutu Malaysia [1995] 2 MLJ 185 (refd)
R Rajasingam v Balwant Singh Purba [1996] 2 MLJ 549 (refd)
Rath v CS Lawrence & Partners [1991] 1 WLR 399 (refd)
Toh Hock Thye & Ors v Toh Chwee Biow [1982] 1 MLJ 152 (refd)
Vasudevan v T Damodaran & Anor [1981] 2 MLJ 150 (refd)
Wong Sin Meng v Wong Sam Moi [1991] 2 MLJ 277 (refd)

Legislation referred to

Probate and Administration Act 1959 s 39
Rules of the High Court 1980 O 25 r 1(1)(b), 34 rr 2(2), 7A(1)

Appeal from: Court of Appeal Civil Appeal No P–02–372 of 1996 (Court of Appeal, Kuala Lumpur) and Civil Suit No 22–19 of 1993 (High Court, Pulau Pinang).

Hamid Sultan bin Abu Backer (*Hamid Sultan & Rakan-Rakan*) for the appellant.
M Kanesan Muthusami (*Tawfeek Badjenid & Partners*) for the respondents.

Cur Adv Vult

Chong Siew Fai CJ (Sabah and Sarawak) (delivering judgment of the court):

Introduction

The learned trial judge had, on 30 May 1996, dismissed the writ action herein of the appellants/plaintiffs ('the plaintiffs') for want of prosecution. On appeal, the Court of Appeal dismissed the appeal with costs. The plaintiffs then obtained leave to appeal to the Federal Court. After hearing arguments of counsel for both sides, we reserved judgment to a date to be fixed. We now give our judgment.

Background

The following facts are not in dispute.

The four plaintiffs were four out of the five children of one Mohamed Mydin Merican bin Meera Hussain (deceased) by his marriage to one KS Mahmootha Beevi (first wife) in 1931. Subsequently, in or about 1950, the deceased married one Fatimah Beevi. Out of his second marriage an issue was born, that is, the first respondent/first defendant in this case ('the first defendant').

It is also accepted that the deceased was the owner of a piece of land described as Lot 465, Sek 11-W Daerah Timur Laut, Georgetown, Penang on which nine houses were erected ('the property'). On or about 2 February 1968, the deceased transferred the property to himself as trustee for the benefit of the first defendant who was then only eight years old. The memorandum of transfer was registered at the Penang Land Registry.

Supplemental to the transfer, the deceased, on the same day (ie 2 February 1968), also executed a trust deed declaring himself to be trustee holding the land in trust for the first defendant and agreeing to transfer the land to any such person or persons as the first defendant might at any time direct. A

On 12 October 1991, the deceased passed away.

Sometime in 1992, the first defendant took out an originating summons No 24-553-1992 in the High Court in Penang and obtained in the said action an ex-parte order dated 5 October 1992 ('the vesting order') vesting the property in his name. B

On 15 January 1993, the plaintiffs filed the present action under appeal (ie suit 22-19-93) and obtained an injunction from the High Court on the following day, (ie 16 January 1993) restraining the first defendant by himself or his servants or agents or otherwise from dealing with the property until further order. On 13 March 1993, they also applied for leave to intervene in the first defendant's originating summons, which they obtained on 30 September 1995. C D

In their statement of claim, the plaintiffs contend, inter alia, that the purported gift of the property is null and void under Islamic law because the property was not then nor at any time thereafter in the possession of the deceased, and neither was the possession of the property ever handed to the first defendant during the lifetime of the deceased nor was it legally vested in the first defendant during the deceased's lifetime. The plaintiffs contend E that since the gift was void, the property becomes part of the estate of the deceased, and until letters of administration is granted, the property would vest in the official administrator under s 39 of the Probate and Administration Act 1959. The plaintiffs also aver that the first defendant had obtained the vesting order without first obtaining letters of administration of the deceased's estate and informing the deceased's F beneficiaries (meaning, presumably, the plaintiffs) and had also intermeddled with the deceased's property and refused, despite repeated requests and demands from the plaintiffs, to account to the plaintiffs the monies received by the first defendant after the death of the deceased. The plaintiffs therefore claim that the first defendant is accountable to them as administrator de son tort. They also seek, inter alia, declarations that the G trust deed dated 2 February 1968 and the purported transfer by way of gift vide the memorandum of transfer are null and void, that the deceased was, at all material times, the legal beneficial owner of the property until his death, and that all the deceased's beneficiaries be beneficially entitled to the property according to the Islamic law of distribution of estates. The H plaintiffs also claim an interlocutory injunction which, as mentioned earlier, was granted by the learned trial judge on 16 January 1993.

We would, for the sake of completeness, briefly advert to the first defendant's amended defence. The main contentions of the defence are that the gift is valid under the civil and the Islamic laws, and that the plaintiffs' I claims are statute barred. Other than the above, the amended defence is mainly one of denial and putting the plaintiffs to strict proof of the allegations in the statement of claim.

A As mentioned earlier, the first defendant applied and the plaintiffs' action was dismissed for want of prosecution by an order dated 30 May 1996 which was affirmed by the Court of Appeal (see [1997] 3 MLJ 800) and which precipitated the hearing of the appeal before us. Thus far, we have, in narrating the facts, purposely left out the events forming the backdrop of the first defendant's application for striking out the plaintiffs' B action since we consider it more convenient to set out separately and in chronological order the happenings which are of importance in this appeal so as not to lose sight of the significance that ought to be duly attached to them.

C *The first defendant's application for striking out (summons in chambers dated 30 March 1996).*

The first defendant in his application sought the dismissal of the plaintiffs' action for want of prosecution on the ground 'bahawa plaintif-plaintif tidak menetapkan tindakan ini untuk perbicaraan ... dalam masa satu bulan dari D penutupan pliding seperti yang diperlu oleh A 25 k 1(1) (b)' ie that the plaintiffs had failed to set down this action for trial ... within one month from the close of the pleadings as required by O 25 r 1(1)(b).

Before going into the merits of the application we would point out an anomaly. The first defendant's application for dismissal of the action was grounded upon the failure of the plaintiffs in setting down the action for trial E under O 25 r 1(1)(b) of the Rules of the High Court 1980. However, what is required of a plaintiff under the said r 1(1)(b) was and is to take out a summons for directions within one month after the pleadings were deemed to be closed rather than setting down action for trial. Setting down an action for trial comes under a different order, ie O 34 of the Rules of the High F Court 1980 (see for example O 34 r 2(2); O 34 r 7A(1)). This unfortunate mistake is also repeated in the brief affidavit of the solicitor for the first defendant made in support of the application. The only noteworthy deposition made by the first defendant's solicitor is his contention (not disputed by the plaintiffs) that he had, by a letter dated 8 March 1996 to the plaintiffs' solicitor, requested the latter to file a summons for directions G within seven days from the receipt of the said letter, but to no avail.

The plaintiffs' affidavit in opposition sought to explain in some detail the steps they had taken since obtaining the interlocutory injunction against the first defendant. We shall, in a moment, outline chronologically those steps in tabular form. Briefly, their explanation for the delay was the H difficulty they faced in obtaining a sealed copy of the order dated 30 September 1995 made in the originating summons giving them leave to intervene and directing them to apply for consolidation of the originating summons with the writ action. Counsel for the plaintiffs also deposed that there was then yet to be heard their application in the originating summons to set aside the vesting order, and that it was not timely to set down their I writ action for trial until that application was heard.

By affidavit in reply, counsel for the first defendant contended that the order made in the originating summons had no relevance to the writ action

and maintained that the plaintiffs must file the summons for directions within one month after the pleadings were closed.

The learned trial judge's judgment dated 8 July 1996

The learned trial judge, in dismissing the plaintiffs' action, was of the opinion that there was a delay of nine months from 22 June 1995 (the date on which he, on the first defendant's application, 'accepted' the first defendant's defence and amended defence dated 14 April 1994 and 21 April 1994 respectively) to 8 March 1996 (when counsel for the first defendant wrote to plaintiffs' counsel requesting summons for directions to be taken out).

The Court of Appeal judgment dated 2 October 1997

In concurring with the learned trial judge, the Court of Appeal agreed that the pleadings were deemed to be closed on the 22 June 1995 and was of the view that the summons for directions should have been taken out on or before 21 July 1995.

On the period of delay, the Court of Appeal set back the period considerably by starting the countdown from 2 February 1968 ie the date of registration of the transfer, thus adding 24 years to the nine months above-mentioned. The Court of Appeal also held that the plaintiffs' failure to comply with the first defendant's letter requesting them to file the summons for directions was contumelious. The Court of Appeal was also of the opinion that the delay was long and deliberate and had prejudiced the first defendant in having the action 'hanging over his head indefinitely, not knowing when it is going to be brought to trial'. They considered it 'a lame excuse' the plaintiffs' explanation that the delay to take out a summons for directions was caused by their (plaintiffs') having to wait for their application for consolidation to be approved by the court. The Court of Appeal opined that the plaintiffs could have applied for consolidation in the summons for directions and found no bona fide reason for the plaintiffs in not having so applied.

Chronology of events

For ease of reference and for a better appreciation of the arguments in this appeal, we propose to set down chronologically in tabular form the material dates and the steps taken in both the plaintiffs' writ action and the first defendant's originating summons. The more important dates are underlined.

No	Dates	Events
1	5 October 1992	First defendant obtained a vesting order against the property in his originating summons action.

2	5 January 1993	Plaintiffs filed the writ of summons, the statement of claim, and the summons-in-chambers for interlocutory injunction.
3	16 January 1993	Interlocutory injunction granted in the plaintiffs' writ action.
4	13 March 1993	Plaintiffs applied to intervene and set aside the vesting order in the first defendant's originating summons.
5	12 April 1994	First defendant filed his defence in plaintiffs' writ action.
6	22 June 1995	Learned trial judge granted first defendant's application to admit his defence and amended defence.
7	30 September 1995	Plaintiffs were granted leave to intervene in the first defendant's originating summons. In the same order the learned trial judge directed the plaintiffs to apply to consolidate the first defendant's originating summons with their writ action.
8	10 October 1995	Plaintiffs wrote to court for the notes of proceedings held on 30 September 1995 after the first defendant failed to tell them the exact terms of the said order.
9	18 October 1995	Plaintiffs received the said notes of proceedings.
10	20 October 1995	Plaintiffs sent a copy of the draft order of 30 September 1995 to first defendant's solicitor. (The draft was not returned by first defendant's solicitor.)
11	18 November 1995	Plaintiffs' solicitor wrote to the first defendant's solicitor enquiring about the draft order but received no reply; by letter dated 29 November 1995, the draft order was sent to court without approval of first defendant's solicitor.
12	In January 1996 (exact date not given in the plaintiff's solicitor's affidavit)	Court Registry returned the approved draft order.
13	24 January 1996	Plaintiffs' solicitor sent the approved order to court registry for sealing.
14	Late February or early March 1996	Court registry returned the duly sealed court order dated 30 September 1995.

15	8 March 1996	First defendant wrote to plaintiffs' solicitor requesting the latter, to file summons for directions in plaintiffs' writ action.
16	21 March 1996	Plaintiffs applied in their writ action to consolidate the first defendant's originating summons with their writ action.
17	30 March 1996	First defendant applied to strike out the plaintiffs' writ action for want of prosecution.
18	16 May 1996	Learned trial judge ordered consolidation of first defendant's originating summons with the plaintiffs' writ action.
19	30 May 1996	Learned trial judge struck out plaintiffs' writ action for want of prosecution.

The appeal to the Federal Court

Before us, counsel for the first defendant submitted that the consolidation order of 16 May 1996 did not reflect the order actually granted by the court because the relief sought in the plaintiffs' application dated 21 March 1996 was not for consolidation but for the first defendant's originating summons to be heard together with the plaintiffs' writ action.

We have perused the order of the learned trial judge dated 30 September 1995 in the first defendant's originating summons. It is clearly stated in the order that the plaintiffs were to 'memohon menyatukan kes ini dengan kes No 22-19-93'. To our mind there is no reason for doubting that the plaintiffs had been directed to consolidate the originating summons with the writ action. The word 'menyatukan' (ie consolidate) was also used by learned trial judge in his notes of proceedings dated 30 September 1995 exhibited in this appeal. Therefore there cannot be any ambiguity in the directive of the learned trial judge on this matter. Furthermore, the order of the learned trial judge dated 16 May 1996 also decreed that 'Saman No 22-19-1993 bersatukan dengan Saman Pemula No 24-553-Tahun 1992 dan hendaklah diteruskan sebagai satu tindakan'. Again this order spoke of consolidating the two actions. Thus, we see no merit in the contention for the first defendant that the two actions were ordered to be heard together and not to be consolidated.

We now move on to the crux of the complaints of the plaintiffs.

For the plaintiffs, it was submitted that they had not been slack in prosecuting their action but had, on the contrary, been actively pursuing it. They contended that the writ action ought not be viewed in isolation but should be considered together with the first defendant's originating summons in tandem. In his affidavit, counsel contended that considerable time was taken before the order of 30 September 1995 directing them to consolidate the two actions were sealed. It is the plaintiffs' case that they needed the sealed order before they could apply for consolidation, and that they needed to consolidate the two actions before applying for the summons for directions.

A Counsel for the first defendant submitted that the provision requiring the plaintiff to take out summons for directions within one month after the close of pleadings must be complied with and that in this case, despite the reminder dated 8 March 1996, the plaintiffs had failed to take out a summons for directions.

B *The law*

The principles of law on dismissal of actions for want of prosecution may be found in the following passage in the judgment of Lord Diplock in *Birkett v James* [1978] AC 297 at p 318:

C > The power should be exercised only where the court is satisfied either: (1) that the default has been intentional and contumelious, eg disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers; and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice
D > to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

The above principles have been adopted by our courts in Malaysia see eg *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150 (FC); *Toh Hock Thye & Ors v Toh Chwee Biow* [1982] 1 MLJ 152 (FC); *R Rajasingam v Balwant*
E *Singh Purba* [1996] 2 MLJ 549 (CA); *Arab-Malaysia Finance Bhd v Malacca Development Corp Sdn Bhd & Ors* [1997] 5 MLJ 685; *Lee Boon Tin v Trustees of Leong San Tong Khoo Kongsi* [1996] 5 MLJ 601; *Balwant Singh Purba v R Rajasingam* [1996] 4 MLJ 404; *KS Chua & Co v Chui Miang Chew* [1995] 4 MLJ 436; *Negara Properties Sdn Bhd v Akitek Bersekutu Malaysia* [1995] 2 MLJ 185; *Wong Sin Meng v Wong Sam Moi* [1991] 2 MLJ 277; *Datuk*
F *Samy Vellu v Karpal Singh* [1989] 3 MLJ 493.

For the purpose of this appeal, we find it convenient to consider the alleged delay under two time-frames, ie from 22 June 1995 to 30 September 1995 and from 30 September 1995 to 30 March 1996.

G *22 June 1995 to 30 September 1995*

This period covers the time when the pleadings were deemed to be closed (22 June 1995) to the date (30 September 1995) when the learned trial judge directed the plaintiffs to apply for consolidation of the two actions. We would test this period against principle 2(a) in *Birkett v James*, ie
H whether the plaintiffs were guilty of inordinate and inexcusable delay in prosecuting their claim. Though no explanation specifically directed to this period was given, there is a general explanation in the affidavit of the plaintiffs' counsel that he could not 'set the action down for trial' until the plaintiffs' application to set aside the 'vesting order in first defendant's originating summons had been heard', and counsel expounded this before
I us.

Whether a delay of over three months is inordinate and inexcusable depends on the facts and circumstances of each particular case. In the

instant case, the delay, in our view, had been adequately explained and is not unreasonable. There existed (and still exists) two actions in tandem (ie the originating summons by the first defendant and the writ action by the plaintiffs) each with claims that are intricately related to those in the other. That being so, the steps taken in the plaintiffs' writ action ought not be viewed in isolation but have to be considered against the backdrop of the events taking place in the first defendant's originating summons. At the time the pleadings in the writ action were deemed to be closed, the plaintiffs had already filed the application seeking to intervene in the first defendant's originating summons, and the application was yet to be heard. Considering that one of the reliefs sought in the plaintiffs' writ action was for a declaration that the trust deed dated 2 February 1968 and the memorandum of transfer (transferring the property to the first defendant himself as trustee) were void, we do not think it unreasonable that the plaintiffs chose to wait for the outcome of their application before proceeding further with their writ action. To an extent, the fact that the judge subsequently, in granting the plaintiffs leave to intervene in the originating summons, had also directed the plaintiffs to apply for consolidation of the two actions lends support to the reasonableness of the stand of the plaintiffs to await the outcome of their application to intervene and to set aside the vesting order. Admittedly, this application of the plaintiffs, though filed on 13 March 1993, was, for reasons unknown to us, not finally disposed of by the court till 30 September 1995. This, however, is essentially a matter in the hands of the court or the registry. There is no reason (and, indeed, none has been advanced) why the plaintiffs should be blamed for it. We are therefore of the view that the alleged delay from 22 June 1995 to 30 September 1995 cannot be said to be inordinate and inexcusable.

30 September 1995 to 30 March 1996

Next, the second time frame between 30 September 1995 and 30 March 1996 (ie from the time of the direction to consolidate the two actions to the date of the first defendant's application to strike out this action). The affidavit of the plaintiffs dated 10 April 1996 detailed the difficulty in extracting the orders granting them leave to intervene and showed that from the time the intervention order was given they had actively taken all the necessary steps to get the said order sealed. They received the sealed order in late February or early March 1996 and applied for consolidation of the two actions on 21 March 1996.

By a letter dated 8 March 1996, the defendants reminded the plaintiffs to take out a summons for directions within seven days. The plaintiffs did not do so but applied instead for consolidation of the two actions on 21 March 1996. It may be argued that the plaintiffs should have applied for directions pursuant to O 25 of the Rules of the High Court 1980, under which the prescribed form provided for consolidation of actions. However, considering that there was a direction to the plaintiffs from the judge to consolidate the two actions, we do not think much blame, if any, can be

attached to the plaintiffs in acting in the manner that they did ie applying for consolidation rather than taking out a summons for directions. In any event, this is not a case where the plaintiffs had remained inexcusably and reprehensibly idle after being directed to apply for consolidation. In our view, there is no inordinate and inexcusable delay. For avoidance of doubt, we would add that in coming to the conclusion of no inordinate and inexcusable delay during the two time-frames, we are not unmindful of the following observation of Lord Denning MR in *Biss v Lambeth Health Authority* [1978] 2 All ER 125 (CA) at p 132:

> It is, I believe, accepted on all hands that if the plaintiff is guilty of inordinate and inexcusable delay before issuing the writ, then it is his duty to proceed with it with expedition after the issue of the writ. He must comply with all the rules of court and do everything that is reasonable to bring the case quickly for trial. Even a short delay after the writ may in many circumstances be regarded as inordinate and inexcusable, and give a basis for an application to dismiss for want of prosecution.

For the plaintiffs, counsel contended that the Court of Appeal erred in taking into account the 24 years prior to the issue of the writ. Counsel submitted that the plaintiffs were unable to institute the proceedings soon after the declaration of the trust and the transfer of the property to the deceased himself as trustee because under the Islamic law of succession the right of a beneficiary accrued only after the death of the donor. Furthermore, during the lifetime of the plaintiffs and the deceased, the deceased could perfect the gift anytime he desired. For the first defendant, Counsel argued that a beneficiary could attack the trust at any time, not necessarily after the death of the settlor. We find it unnecessary to deal with the arguments. Since we find that there had been no inordinate and inexcusable delay between 22 June 1995 and 30 March 1996, the plaintiffs' tardiness in instituting the action cannot in itself form the basis for dismissing the plaintiffs' action for want of prosecution. In *Birkett v James* [1978] AC 297 (HL), Lord Diplock said at p 322 E–G:

> It follows a fortiori from what I have already said in relation to the effect of statutes of limitation upon the power of the court to dismiss actions for want of prosecution that time elapsed before the issue of a writ within the limitation period cannot of itself constitute inordinate delay however much the defendant may already have been prejudiced by the consequent lack of early notice of the claim against him, the fading recollections of his potential witnesses, their death or their untraceability. To justify dismissal of an action for want of prosecution the delay relied upon must relate to time which the plaintiff allows to lapse unnecessarily after the writ has been issued. A late start makes it the more incumbent upon the plaintiff to proceed with all due speed and a pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time that has already passed before the writ was issued.

Furthermore, since there had been no inordinate and inexcusable delay, the question of substantial risk for a fair trial or prejudice to the first defendant consequential upon the delay (principle 2(b) in *Birkett v James* [1978] AC 297) does not arise.

The following observation in Slade LJ in *Rath v CS Lawrence & Partners* [1991] 1 WLR 399 (CA) is significant. He said at p 411:

> The late issue of a writ is one thing; by itself it cannot be regarded as culpable. The casual and dilatory conduct of proceedings in breach of the rules, after a writ has been issued, is another thing. If a person who claims to have a cause of action chooses to take advantage of the process of the court by issuing a writ at whatever time during the limitation period, he has, in the words of Lord Diplock [1978] AC 297 at p 323, 'a corresponding right to continue to prosecute it to trial and judgment *so long as he does so with reasonable diligence.*' (Emphasis added.)

For the plaintiff, counsel contended that it was wrong for the learned trial judge to strike out the plaintiffs' writ action for want of prosecution when barely 14 days earlier he had ordered the consolidation of the first defendant's originating summons with the plaintiffs' writ action. In our view, there is some merit in the contention. The order for consolidation was made subsequent to the first defendant filing the application to strike out the plaintiffs' writ action. It is reasonable to assume that by ordering consolidation, the learned trial judge must have considered it proper for the plaintiffs' writ action to proceed and that there existed some common question of law or fact or some other reason rendering it desirable that the whole should be disposed of at the same time.

For the above reasons, we conclude that the plaintiffs had not been guilty of such inordinate and inexcusable delay as warranting the dismissal of the action for want of prosecution. That being our conclusion, it is unnecessary to consider whether by reason of inordinate and inexcusable delay there exists any substantial risk of impossibility of a fair trial or whether the defendants would thereby be or likely to be seriously prejudiced (principle 2(b) in *Birkett v James*).

The appeal is allowed with costs to the plaintiffs here and in the courts below. The order of the Court of Appeal and the order of the High Court made on 16 June 1997 and 30 May 1996 respectively are set aside. The deposits for this appeal and for appeal to the Court of Appeal be refunded to the plaintiffs. The case No 22–19–1993 herein be restored and remitted to the High Court at Pulau Pinang for hearing in the usual way in accordance with the Rules of the High Court 1980.

Appeal allowed.

Reported by Benjamin Yong